No. 15,789

United States Court of Appeals

For the Ninth Circuit

HELEN MAY GARDNER GLASER and GEORGE R. GARDNER,

Appellants,

vs.

FRANCES SHENK HESTER, also known as Frances Shenk Hester Gardner and WILLANE HESTER HAYNES,

Appellees.

BRIEF FOR APPELLEES.

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FILED
MAY 16 1958

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JURISDICTION.

Jurisdiction is as noted in Appellants' brief.

PRELIMINARY STATEMENT.

(a) The parties:

Appellants are the sister and brother of William E. Gardner, Jr., a deceased veteran of World War II.

Appellees are the widow of the deceased veteran and her daughter by a prior marriage.

The United States of America is stakeholder of proceeds of the National Service Life Insurance Policy

of the deceased veteran, and is not a party to the appeal.

STATEMENT OF THE CASE.

On April 30, 1951, William E. Gardner, Jr., executed a change in beneficiary of his National Service Life Insurance Policy, wherein he revoked the prior designation of his sister and brother as beneficiaries, and designated appellee Frances Gardner as primary beneficiary and appellee Willane Haynes contingent beneficiary.

Appellees claim the veteran was of unsound mind when he executed the designation of beneficiary on April 30, 1951. (Complaint, First Cause of Action, Para. XII, TR p. 7; Complaint, Second Cause of Action, Para. II, TR p. 8); that the execution of said designation of beneficiary on April 30, 1951 was effected by reason of undue influence exerted upon the veteran by appellees. (Complaint, Third Cause of Action, TR pp. 8 and 9.)

As an incident of his service the veteran developed epilepsy, mixed type, grand mal and petit mal. (TR p. 31.)

In support of their claim of alleged unsoundness of mind, appellees read to the Court and jury selections from this veteran's medical records, covering the period May 25, 1942 to December 28, 1950. (TR pp. 27-66.)

No evidence was offered by appellants on the veteran's condition after December 28, 1950. Their evi-

dence closed with the final report of the Veterans' Administration Hospital at Palo Alto, California, dated December 28, 1950, upon the veteran's final discharge therefrom. (Exhibit "N" TR pp. 64 and 65.) The closing summary of this report was introduced upon the insistence of appellees when it was apparent appellants would refrain from such introduction. This final diagnosis is of major significance in construing the order of directed verdict by the Trial Court:

> "Diagnosis: (1) Epilepsy, idiopathic, grand mal, with psychotic reaction of agitated, confused type, chronic, mild, in complete remission, manifested by frequent epileptiform seizures, agitated combative impulsive behaviour, irritability, paranoid trends, and periods of mental confusion. Seizures controlled. (2) Scarring and keloid formation, right anterior and post auricular areas, and pinna, residual burn. (3) Fracture, skull, basal, right, sustained in epileptic seizure November 10, 1949, history of.
>
> 'Status: Discharged December 22, 1950, Maximum Hospital Benefit. Was committed. Competent. Has no guardian. [128] Had full ground and pass privileges.
>
> 'Signed: R. S. Mowry, M.D., Medical Officer.
> 'J. T. Ferguson, M.D., Chief, continued treatment service.
>
> 'Approved: J. M. Wallner, M.D., Chief, Psychiatry.' " (TR pp. 65-66.)

None of appellants' witnesses saw the veteran after October 2, 1950, when he visited his mother at her

home (TR p. 114), seven months before the designation of beneficiary was executed.

Construing all of the evidence and every reasonable inference deducible therefrom in favor of appellants, the record is absolutely void on the subject of the veteran's mental competency on April 30, 1951. Though appellants had readily available irrefutable evidence of this veteran's mental capacity on April 30, 1951, they chose not to introduce it:

> "We could have come here, put the testimony of the doctor in that there was nothing wrong with him on April 30, 1951, and we wouldn't have had a true picture." (Statement of appellants' counsel to the Court, TR p. 112.)

It is the theory of appellants' case, a person though admittedly affectionate with all members of his family, does violence to the propensities of human nature by leaving the proceeds of one insurance policy to his widow rather than his sister and brother. Appellants further contend an inference of mental incompetency can be drawn from this so-called unnatural act, coupled with evidence of (a) epilepsy and (b) some erratic behavior many, many months before the execution of a questioned document. We submit such an inference could be drawn only by resort to sheer conjecture and speculation.

ANSWER TO CLAIMS OF ERROR.

1. THE DISTRICT COURT DID NOT ERR IN DELETING THE WORD "SUICIDE" FROM THE DEATH CERTIFICATE OF THE DECEASED VETERAN. (Appellants' Exhibit "O-1".)

On March 16, 1952, 12½ months after he executed the subject designation of beneficiary, the veteran died. According to the certified copy of death certificate (appellants' Exhibit "O-1") the disease or condition directly leading to the death was "bronchopneumonia. Antecedent causes due to barbituate poisoning." (TR p. 69.) This certificate contains a blank space labeled "29a" which calls for the following information: "Specify, accident, suicide or homicide:" In this space on the subject certificate some person had typed in the word "Suicide." Appellees objected to the introduction of this death certificate on the basis it did not conform to the statute [Health and Safety Code 10427] because the term "probable" did not precede the conclusion of "suicide."

California Health and Safety Code Sec. 10551, before its repeal by the legislature in 1957, provided:

> "Evidentiary effect of photostatic or certified copies. Any photostatic copy of the record of a birth, death or marriage, or a copy, properly certified by the state or local registrar, or county recorder to have been registered within a period of one year from the date of the event is prima facie evidence in all courts and places of the facts stated in it."

Sec. 10427 of the same code also repealed by the legislature in 1957, provides:

> "Death certificate: Prerequisites to interment. [Statements as to disease or external cause of

death] The coroner or other proper officer whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall:

(a) State in his certificate the name of the disease causing death, or if from external causes (1) the means of death; and (2) whether (probably) accidental, suicidal, or homicidal.

(b) Furnish such information as may be required by the State Registrar in order properly to classify the death.

[Issuance of certificate and permit authorizes interment.] Upon the issuance of the death certificate and burial permit the cemetery authority may proceed with the interment."

The California District Court of Appeal, 4th District, has squarely ruled on the issue presented in this appeal involving the death certificate. In *People v. Proctor,* 108 C.A. 2d 739, 239 P. 2d 454, the term "probably" was also omitted from the conclusion or opinion as to the cause of death. There the Court held the objection to the introduction of the certificate should have been sustained, because the term "probably" was omitted. The Court held:

> "The statutory requirement that a death certificate must include the word 'probably' before the words 'accidental,' 'suicidal' or 'homicidal' clearly indicates the intent of the Legislature that only an opinion or conclusion as to whether or not a death is homicidal should be stated. We conclude, therefore, that the objection to the introduction of the certificate in evidence to show that the

death was 'homicidal' should have been sustained."

Being inadmissible in the State Court the certificate was likewise inadmissible in the District Court (*United States v. Johnson,* 8th Cir. 72 F. 2d 614, 616).

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2. THE DISTRICT COURT DID NOT ERR IN SUSTAINING OBJECTIONS TO THE ADMISSIBILITY OF THE LETTERS AND WRITINGS OF THE DECEASED VETERAN. (Exhibits U, AB, AC, AD, AE, AG, AH and AI.)

These writings were offered to prove that the deceased veteran had a family which he loved, and he exhibited an intent to make a will. (TR pp. 80, 81 and 82.)

Appellants failed to offer authority that a contract of insurance is a will. No issue was raised by the pleadings concerning love or affection for his family. Appellants agreed in open court the veteran loved his family. (TR p. 98.)

It is not questioned decedent was competent to enter into the marriage contract with appellee Frances Gardner. Regardless of gratuitous so-called trust contention, appellants have no claim equal or superior to appellees.

In addition, these writings were incompetent hearsay, and therefore inadmissible.

In *Hawkey v. United States,* 108 F. Supp. 941, a claimant to the proceeds of a National Service Life Insurance Policy attempted to introduce letters written by the veteran to her in support of her claim. The

Court held: "These letters are purely hearsay and were not admissible in evidence."

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3. THE COURT DID NOT ERR IN SUSTAINING OBJECTIONS TO THE TESTIMONY OF THE VARIOUS WITNESSES CONCERNING THE RELATIONSHIP OF THE VETERAN WITH HIS FAMILY INCLUDING HIS WIDOW.

The purpose of this testimony was to show the veteran had a family (TR pp. 78 and 81), which was not in dispute (TR p. 81); that he loved his family, which was agreed (TR p. 98); that he had two children—this was stipulated (TR p. 73); that he had a mother, he had a father, he had a wife, and he had two children, and then, he had no wife, then he had a wife; he had a brother and a sister, the appellants; none of which issues were in dispute or anywise involved. (TR p. 81.) None of these matters had any bearing upon the issue of the veteran's mental capacity to execute the designation of beneficiary on April 30, 1951.

Appellants charge that the District Court unduly restricted them in their scope of inquiry concerning the mental capacity of the veteran, is patently unfair. The Court showed great patience and allowed appellants wide latitude in this regard. They were allowed to read selected excerpts from medical records covering the period 1942 to the end of 1950 (TR pp. 25 and 66), yet they would have omitted, except for the insistence of appellees, reading to the Court and jury the final diagnosis upon discharge of the veteran in December 1950. It ill becomes appellants to criti-

cize the Trial Court when they have purposely tried to omit evidence which would have most likely assisted the Court and jury in determining the competency of this veteran: *"Competent:"* (TR p. 65.)

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4. THE DISTRICT COURT DID NOT ERR IN SUSTAINING THE MOTION FOR DIRECTED VERDICT.

Considering the evidence the light most favorable to appellants, and drawing in their favor every legitimate inference, no fair minded person could infer that this veteran was mentally incompetent or that he was the subject of undue influence on April 30, 1951.

Appellants in the Trial Court, and in this Court, rely upon *Taylor v. United States,* 113 F. Supp. 143. It is from this case they draw their language of "mental delusion". In that case, however, there was ample evidence of mental delusion. There was evidence that for no reason at all the veteran had concluded marital discord existed between him and his wife. He charged her parents with antipathy towards the Navy; he met his death while making an unprovoked attack on his wife who had been a faithful and loving spouse.

It was shown the veteran was suffering from a mental disease known as dementia praecox, and that he was laboring under the insane delusion of marital discord at the very time he executed the designation of beneficiary. In the case at bar there is no evidence of any sort of delusion or discord between the veteran and members of his family; to the contrary, it was

shown and stipulated that he had nothing but love for them. Appellants would, however, label as an insane delusion the leaving of the veteran's life insurance to his spouse. Such argument is frivolous.

In *Taylor v. United States,* supra, it is held the burden of proof is upon appellants to establish by a preponderance of the evidence, that at the time the document was executed the decedent lacked testamentary capacity.

ARGUMENT.

The controlling section of the National Service Life Insurance Act provides that the insured shall have the right to designate the beneficiary of the insurance and shall at all times have the right to change the beneficiary. (38 U.S.C.A. Section 802g.)

No Court or state law can deny the insured in a National Service Life Insurance policy the right to change the beneficiary of it or designate some other person than the designated beneficiary to receive the proceeds thereof. (*Wissner v. Wissner,* 1950, 338 U.S. 665, 70 S. Ct. 398, 94 L. Ed. 424; *Heifner v. Soderstrom,* 134 F. Supp. 174).

Appellants' attempt to expand this litigation into the collateral issues presented by their theory of "constructive trust" of the proceeds of the policy, has previously been rejected in this circuit. (*Pack v. United States,* 9th Cir., 176 F. 2d 770, *Tohulka v. United States,* 7th Circuit, 204 F. 2d 414.)

Appellants assert at p. 20 of their brief:

> "The test, however, is not whether Gardner was mentally incompetent on April 30, 1951".

The law is otherwise. The test is whether Gardner was mentally incompetent on April 30, 1951, and the burden of proof is upon appellants to establish by a preponderance of the evidence that on that date the decedent lacked testamentary capacity. (*Taylor v. United States,* supra.)

To overcome the presumption of sanity, appellants must show by a preponderance of the evidence, the claimed incompetent was of unsound mind at the time he executed the designation of beneficiary. (*Estate of Smith,* 200 Cal. 152, 158, 252 P. 325; *Estate of Lingenfelter,* 38 Cal. 2d 571, 241 P. 2d 990.)

The evidence offered and produced by appellants on the issue of the veteran's incompetency near the date in question, was that concerning some irrational conduct several months before he executed the subject designation of beneficiary. According to the veteran's own statement on admission to the hospital, the reason for his conduct was "I have epilepsy and happened to get off my medication, and combined with drinking I had a period of confused behaviour." (TR p. 54.) After hospitalization and treatment following this period the veteran was discharged as "competent". (TR p. 65.)

It has been repeatedly held that before evidence may be left to the jury: "There is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which

a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. The rule is settled for the Federal Courts that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct a jury to find according to the views of the Court." *Pennsylvania R. Co. v. Chamberlain,* 1933, 288 U.S. 333, 343, 53 S. Ct. 391, 395, 77 L. Ed. 819; and *Wardman v. Washington Loan & Trust Co.,* 1937, 67 App. D.C. 184, 186, 90 F. 2d 429, 431.

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury." *Gunning v. Cooley,* 1930, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720, quoted in *Deere v. Southern Pacific Co.,* 9 Cir. 1941, 123 F. 2d 438, 440, certiorari denied 1942, 315 U.S. 819, 62 S. Ct. 916, 86 L. Ed. 1217; *De Zon v. American President Lines,* 9 Cir. 1942, 129 F. 2d 404, certiorari granted 1942, 317 U.S. 617, 63 S. Ct. 160, 87 L. Ed. 501, affirmed 1943, 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065, rehearing denied 319 U.S. 780, 63 S. Ct. 1025, 87 L. Ed. 1725. There must be substantial evidence offered by plaintiff to justify submission of the case to the jury. *United States v. Holland,* 9 Cir., 1940, 111 F. 2d 949; *Galloway v. United States,* 9 Cir., 1942, 130 F. 2d 467, certiorari granted 1943, 317 U.S. 622, 63 S. Ct. 437, 87 L. Ed. 504, affirmed 1943, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458, rehearing denied 1943, 320 U.S. 214, 63 S. Ct. 1443, 87 L. Ed. 1851; *Carew v. R.K.O. Radio Pictures,* D.C.S.D. Cal. 1942, 43 F. Supp. 199.

The absence of evidence that William E. Gardner, Jr., was mentally incompetent or acting under undue influence on April 30, 1951, gave the Trial Court no other choice except to grant appellants' motion for directed verdict.

CONCLUSION.

For the reasons stated, this Honorable Court should sustain the judgment entered herein.

Dated, San Francisco, California,
May 13, 1958.

Respectfully submitted,
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